1952

Bonnye V. Hooper v. General Motors Corporation : Brief of Appellant

Utah Supreme Court

McBroom & Hanni; E. R. Miller, Jr.; Attorneys for Appellant;

IN THE SUPREME COURT
of the
STATE OF UTAH

BONNYE V. HOOPER,
Plaintiff and Appellant,

vs.

GENERAL MOTORS CORPORATION,
Defendant and Respondent,

Civil No. 7887

BRIEF OF APPELLANT

McBROOM & HANNI
of Salt Lake City, Utah, and
E. R. MILLER, JR. of Ely, Nevada,
Attorneys for Appellant.

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STATEMENT OF FACTS

Bonnye V. Hooper, plaintiff and appellant herein, and her son, Beverly Hooper, purchased a new model 1951, Chevrolet pickup truck from the Hyland Motor Company in Ely, Nevada, on July 21, 1951. The truck was manufactured and assembled by General Motors Corporation, defendant and respondent, herein, and was sold by respondent to the Hyland Motor Company, one of respondent's dealers (R. 254, 255).

The left rear wheel on the truck was defectively manufactured. On October 15, 1951, while appellant was driving the truck, the defective wheel failed causing

the truck to overturn and resulting in serious injuries to appellant.

From a verdict and judgment in favor of General Motors Corporation appellant, Bonnye V. Hooper, appeals.

POINTS ARGUED BY APPELLANT

1. The trial court's Instruction No. 6 was prejudicial error.

2. The trial court erred in admitting opinion evidence of Mr. Arthur Harris on the ultimate fact in issue.

3. The trial court erred in admitting the hearsay testimony of Mr. Lowell G. Fouts.

4. The trial court erred in admitting the speculative testimony of Mr. Arthur Harris.

STATEMENT OF EVIDENCE

The plaintiff and appellant is a resident of White Pine County, Nevada. She and her son, Beverly U. Hooper, as partners own and operate a cattle ranch in Newark Valley, White Pine County, Nevada. (R. 120)

U. S. Highway No. 50 is a paved highway running in an easterly and westerly direction between Eureka, Nevada, and Ely, Nevada. The Newark Valley Highway is a gravelled road that runs in a northerly and southerly direction and intersects U. S. Highway No. 50 on the north side thereof at a point approximately 14 miles east of Eureka, Nevada. At the intersection of the two highways there is a club and bar known as the El Dorado Club. The Hooper ranch is located 23 miles north of the intersection on the Newark Valley Highway.

On July 21, 1951, appellant and her son purchased a new model 1951 Chevrolet pickup truck from the Hyland Motor Company in Ely, Nevada. The truck was purchased for ranch use. (R. 56, 57, 120) Hyland Motor Company purchased the truck from General Motors Corporation, defendant and respondent, at wholesale and sold it to appellant and her son at retail. Respondent manufactured and assembled the truck. The left rear wheel on said truck was manufactured by the Norris Thermador Corporation and was assembled and placed on the truck by respondent. (R. 254, 255)

On October 15, 1951, appellant left the ranch in the truck at approximately 6:05 p.m. She was going to Eureka, Nevada, to attend a lodge meeting and to attend to some ranch business (R. 121). Appellant was alone in the truck (R. 121). Appellant was driving the truck at about 30 miles per hour in a southerly direction on the Newark Valley Highway and, when she reached a point approximately six or seven miles north of the said intersection, the left rear end of the truck suddenly dropped down. The truck then swerved to the left; and, when appellant tried to turn it back to the right, it tipped over in such a manner that it went over the right front fender, on over on top of the cab and down on its left side. (R. 122) The truck skidded for several feet on its left side. When it came to rest, it was lying on its left side facing in a northwesterly direction on the surface of the gravelled highway (R. 257, 260). The left doof was sprung completely open. (R. 123, 126, 127)

Appellant's right foot and leg were pinned between

the upper rear portion of the cab of the truck and the gravelled road The outside of appellant's right foot and leg were lying next to the cab and the inside of her right foot and leg were lying on the gravelled road. (R. 123, 124, 125)

The accident occurred between 6:30 p.m. and 6:45 p.m. on October 15, 1951 (R. 126). Appellant lay pinned under the truck from then until help arrived, which was over an hour after the accident.

The first person to arrive at the scene was Mrs. Jim Stinnett (R. 126). She immediately went for help. Jim Stinnett, Dan Milovich and two other men went to the scene upon being notified of the accident by Mrs. Stinnett. When they arrived at the scene of the accident, they lifted the truck onto its wheels, put appellant in Dan Milovich's automobile and took her to the El Dorado Club where an ambulance was called to take her to Ely, Nevada. (R. 128, 129, 130)

As a result of the accident appellant received very serious permanent injuries. Her right foot was about two-thirds amputated. She suffered a compound comminuted fracture of the right tibia (shin bone) and fibula. The right tibia and fibula were badly splintered and serious damage to the right astragulus (foot bone) and the right ankle joint was sustained. The left ankle bone was fractured, a right upper tooth knocked out and both legs were severely bruised. (R. 166 to 175, 243, 247, 248, 249)

Appellant was in the hospital from October 15, 1951, until February 11, 1952.

It is the opinion of the doctors that Mrs. Hooper's right leg will ultimately have to be amputated midway between the ankle and knee. Even if the right leg is saved, and in the opinion of the doctors there is only one in ten chances of saving it, the right leg will be about an inch shorter than the left leg and the ankle will be permanently stiff. Whether the right foot is saved or amputated, Mrs. Hooper will be limited so far as engaging in her occupation as a rancher and carrying on her ranch activities by about 75% for the rest of her life. (R. 171 to 174, 247, 248, 249)

At the time of the accident the truck was less than three months old. It had been driven approximately 6,700 miles (R. 82).

The left rear wheel of the truck consists of a "spider" and a "rim." The spider is the center part of the wheel that bolts to the hub or drum of the axle. The rim is that part of the wheel on which the tire is mounted. The rim is attached to the spider by rivets.

The spider, Exhibit "A", and the rim, Exhibit "B", were found in a completely separated condition after the accident. The spider, Exhibit "A", was still bolted to the left rear hub of the truck. The tire, Exhibit "C", was flat and was still mounted on the rim, Exhibit "B". The rim had come loose from the spider, had completely separated therefrom and was lying on the ground after the accident. (R. 63, 64, 65, 66, 152, 153, 164, 165, 264, 265, 272)

Dan Milovich, a witness for appellant, testified that immediately after the accident the spider, Exhibit "A",

and the rim, Exhibit "B", were found in a completely separated condition. (R. 152, 153, 164, 165) Mr. Jim Stinnett, a witness for respondent, testified that immediately after the accident the spider, Exhibit "A", and the rim, Exhibit "B", were found in a completely separated condition. (R. 264, 265, 272)

There was a conflict in the evidence as to whether or not the left rear wheel of the truck was defective and as to whether or not the defect caused the accident and injuries in question.

There are twelve rivet holes in the rim. For identification purposes, the valve stem hole in the rim is placed up, and the rivet role immediately below the valve stem hole is number 12. The rivet hole next to the valve stem hole in a clockwise direction is number 1, the next one number 2 and so on around to number 12.

An examination of the rim, Exhibit "B" immediately after the accident revealed that the rim on the under side near rivet holes number 1, 2, 3 and 4 was shiny and worn (R. 66, 67). Mr. David H. Curtis, expert witness for appellant, testified that the smoothness and wear had taken place over a considerable length of time prior to failure of the wheel (R. 184, 185). He testified that this wear showed there had been loose rivets in holes numbered 1, 2 and 3 prior to failure of the wheel and the resulting accident, and that this looseness would have permitted movement between the spider, Exhibit "A", and the rim, Exhibit "B", and also would have permitted vibration and oscillation between the two component parts as the truck was

being driven (R. 185). Mr. Curtis further testified that three loose rivets in an otherwise normal wheel of the type represented by Exhibits "A" and "B" would cause an ultimate failure of the entire wheel (R. 185, 186). He further testified that the reasons it would cause such a failure are: 1. that looseness of three rivets would cause a shifting of the load to the other rivets which could result in an ultimate failure of the wheel, and 2. that looseness in the rivets would cause a vibration or oscillation which could cause the other rivets to fatigue and fail (R. 185, 186).

Mr. Arthur Harris, an employee of and an expert witness for respondent, testified that in his opinion the separation of the spider and rim as represented by Exhibits "A" and "B" was caused by an extremely heavy blow being struck on the outer rim which caused the spider to distort and then shear the rivets (R. 362, 363).

ARGUMENT

Point 1.

THE TRIAL COURT'S INSTRUCTION NO. 6 WAS PREJUDICIAL ERROR.

The trial court instructed the jury as follows:

INSTRUCTION NO. 6 (R. 36)

(Same instruction as respondent's requested instruction No. 3, R. 19)

> "You are instructed that the fact that the rim and spider were found in a separated condition after the accident is no evidence of the fact that

they were defective, unsound or unsafe when assembled and sold by defendant, General Motors Corporation, nor is it evidence of the fact that the separating of the rim and spider caused the truck to go out of control and over turn."

The effect of this instruction is to remove completely from the consideration of the jury, the evidence that the spider, Exhibit "A", and the rim, Exhibit "B", were found completely separated after the accident. The instruction is a declaration by the trial court, that as a matter of law, the jury must not consider the fact of such separation on the issue of defective manufacture and on the issue of causation.

To point up the vice of this instruction we must look briefly at the evidence on the issue of defective manufacture and on the issue of whether the separation of the spider and rim caused the truck to overturn which resulted in appellant's injuries.

Appellant's evidence on these two issues was:

1. The fact that the spider, Exhibit "A" and the rim, Exhibit "B", were found in a completely separated condition after the accident (R. 63, 64, 65, 66, 152, 153, 164, 165, 264, 265, 272).

2. That worn shiny spots appeared on the rim, Exhibit "B", on the under side of rivet holes numbered 1, 2, 3 and 4 (R. 66, 67, 184, 185).

3. Expert testimony to the effect that the smoothness and wear had taken place over a considerable length of time prior to the ultimate failure of the wheel; that such wear showed there had been loose rivets in holes numbered 1, 2 and 3 prior to failure of the wheel and the result-

ing accident; that this looseness would have permitted movement between the spider, Exhibit "A", and the rim, Exhibit "B", and would also have permitted vibration and oscillation between the two component parts; that three such loose rivets would cause an ultimate failure of the wheel (R. 184, 185, 186).

4. The truck was less than three months old and had been driven only 6,700 miles (R. 56, 57, 82).

5. That there had been no prior damage to the left rear wheel of the truck (See Exhibit "S", R. 42, 67, 81, 82 to 86, 91, 92, 113, 239, 240, 241).

6. That the first indication that anything was wrong just prior to the accident was that the left rear end of the truck suddenly dropped down. The truck then swerved to the left and, when turned back to the right, it tipped over (R. 122, 123).

7. That an automobile track at the scene of the accident swerved to the left out onto the shoulder of the road and back slightly to the right (R. 79, 80, 151, 152, 177, 178, Exhibit "7").

Respondent's evidence was in conflict with that of appellant's and attempted to show that the wheel was not defective and that the separation of the spider and rim was caused by a heavy blow being struck on the rim (R. 362, 363).

1. DEFECTIVE MANUFACTURE.

Instruction No. 6, in effect, told the jury, that it could not consider, and that it must disregard completely,

the fact that the rim and the spider separated and were found in that condition after the accident (R. 36).

The fact that the rim and spider were found in a separated condition after the accident was relevant on the issue of defective manufacture. The fact of such separation, when considered with all the other circumstances, tended to prove that the wheel was defectively manufactured. The other evidence and circumstances to be considered with the fact of the separation were: worn spots under three rivet holes from which it could be inferred there were three loose rivets in the wheel, the expert's opinion that that wear had taken place over a considerable length of time, that three loose rivets would cause an ultimate failure of the wheel, that the first indication of anything being wrong was the dropping of the left rear end, the swerving of the truck to the left, the attempt to turn it to the right and its tipping over, that an automobile track at the scene swerved to the left out onto the shoulder of the road and back to the right, that the truck was practically new and had not been previously damaged. All of this evidence and the circumstances surrounding the accident when considered with the fact of the separation of the spider and rim have probative value and tend to prove that the wheel was faulty, and the jury was entitled to consider the fact of separation in its determination of the ultimate issue of whether or not the wheel was defective.

This is not a case involving the rule announced in *Morrisson v. Perry,* 104 Utah 139, 122 P(2) 191, to the effect that the mere happening of an automobile colli-

sion gives rise to no presumption of negligence. This, on the contrary, is a singling out, by the trial court, of a vital part of appellant's evidence and a direction, as a matter of law, that it may not be considered by the jury in determining whether or not there was a defect in the wheel. The instruction amounts to not only a comment on the evidence but a direction to the jurors that they will decide the case as though the fact of the separation of the spider and rim were not in evidence and not before them at all.

To withdraw from the jury's consideration the fact of the separation of the spider and rim was to withdraw a vital and substantial link from the chain of circumstances, all of which, when considered together, proved that the wheel was defectively manufactured.

2. CAUSATION.

The instruction not only removes the fact of separation of the rim and spider from the case on the issue of defective manufacture, but it also declares that the fact of such separation may not be considered by the jury on the question of whether it caused the truck to go out of control and over turn.

If the fact of the separation is taken out of the case, what do we have left on the issue of causation? That can best be illustrated by assuming that, instead of separating, the spider and rim remained intact and were found in an apparently sound condition after the accident. If the spider and rim had been found in an apparently normal condition after the accident, could

appellant have ever claimed the over turning of the truck was caused by the failure of the wheel? The answer is obvious, no such claim could possibly have been made.

Certainly the fact of the separation of the spider and rim was relevant on the issue of what caused the truck to over turn. Appellant testified that she was driving down a gravel road at a normal rate of speed, and the first indication of an impending accident was that she felt the left rear end suddenly drop down, the truck swerve to the left, and when she tried to turn it back to the right, it tipped over (R. 122, 123, 127). After the accident the rim and spider were found in a separated condition (R. 63, 64, 65, 66, 152, 153, 164, 165, 264, 265, 272). Take the fact of such separation from the jury, (as instruction No. 6 does) and a substantial part of appellant's evidence as to what caused the truck to tip over has been thrown out and excluded from the consideration of the jury.

That the evidence as to the separated condition of the rim, Exhibit "B", and the spider, Exhibit "A", was relevant and admissible see *Kelly v. Huber Baking Co.,* 145 Md. 321, 125 A. 782, (evidence of condition of steering gear after accident held relevant and properly admitted); *Curtin v. Benjamin,* 305 Mass. 489, 26 N.E.(2) 354, 129 A.L.R. 433, (condition of left front tire after accident held admissible to show point of impact); *Hupp Motor Company v. Wadsworth,* 113 F(2) 827, (evidence that pitman arm was completely disconnected from the ball stud after accident and other evidence as

to wear on, and condition of, steering mechanism after accident was held substantial evidence that accident occurred by reason of defective steering mechanism); *Rotche v. Buick Motor Co.,* 358 Ill. 527, 193 N.E. 529, (necessary implication of decision is that had proper foundation been laid as to condition of cotter pins in brake mechanism observed two weeks after accident, it would have been relevant and admissible on issue of defective manufacture and causation); *Staples v. Spence,* 179 Va. 359, 19 S.E.(2) 69, (photographs of automobiles immediately after accident admitted, but oral testimony as to condition of automobiles after accident excluded; held, error); *Evansville Container Corporation v. McDonald,* 132 F(2) 80, (condition of automobiles after accident admissible as means of determining fault); 129 A.L.R. 438, (general rule that evidence as to condition of an automobile subsequent to an accident is admissible as a means of ascertaining the responsibility for the accident, where the evidence is not too remote from the time of the accident, and where it is shown that the condition of the automobile has not changed since the accident); *Dixon v. Wood,* 81 N.H. 385, 125 A. 261, (condition of automobile after accident relevant on issue as to how accident occurred); *General Motors Corporation v. Johnson,* 137 F(2) 320, evidence of condition of axle housing and transmission housing after accident, and evidence of wear on such parts that appeared after accident was held relevant and held substantial evidence that accident occurred by reason of faulty construction of truck); 65 C.J.S. Sec. 231, page 1046; 20

Am. Jur. Sec. 272, page 260.

We submit that the trial court, by withdrawing from the jury's consideration the fact of the separation of the spider and rim, committed prejudicial error.

POINT 2.

THE TRIAL COURT ERRED IN ADMITTING OPINION EVIDENCE OF MR. ARTHUR HARRIS ON THE ULTIMATE FACT IN ISSUE.

The trial court, over objection, permitted Mr. Arthur Harris to testify as to his conclusion on the ultimate fact in issue. In response to a question, * * *

> Q. "Do you have an opinion, Mr. Harris, as to what occurred to cause the separation of the spider and rim as represented by Exhibits "A" and "B"?"

The trial court over objection permitted Mr. Harris to testify that in his opinion, "that the wheel was struck an extremely heavy blow by some object on the outer rim which first * * * caused the spider to distort and then shear off the rivets." (R. 362, 363)

DeGroot v. Winters et al., 261 Mich. 660, 249 N.W. 69, was a malpractice suit. A doctor for the plaintiff was permitted to testify that malpractice *"did"* produce the condition suffered by plaintiff. On appeal the Supreme Court held that on the ultimate issue of whether plaintiff's condition was or was not occasioned by malpractice, expert opinion testimony that malpractice *"did"* rather than *"could"* occasion the result was incompetent because it invaded the province of the jury. The judgment for the plaintiff was reversed.

In the case of *Layton v. Cregan & Mallory Co. Inc.,* 265 Mich. 574, 252 N.W. 337, the court permitted a medical witness to answer the following question: "Is the condition you found during all this time, in your opinion, caused by the injury she sustained in the accident, or by working on the farm?" The court in reversing the judgment for the plaintiff held that this testimony invaded the province of the jury, and its admission, over objection, constituted error. For a case to the same effect see *Kenower v. Hotels, Statley Co.,* 124 F(2) at page 663. For a case not in point but announcing the general rule that an expert witness may not express his opinion on the ultimate fact in issue see *Utah Copper Co. vs. Industrial Commission,* 69 Utah 452, 256 P. 399.

The rationale of the cases cited are to the effect that an expert witness may express an opinion as to what "*could*" or "*might*" have caused a particular condition, but he cannot be permitted to express an opinion that an alleged cause "*was*" the cause of or "*did*" cause the particular condition. Whether a certain cause did in fact produce a given condition is for the jury to decide and is not a matter upon which an expert may express an opinion. See the excellent discussion of this problem in *DeGroot v. Winters, supra,* and the cases cited therein.

In the case before this court, Mr. Arthur Harris, over objection, was permitted to testify that in his opinion the separation of the spider, Exhibit "A", and the rim, Exhibit "B", "*was*" caused by an extremely heavy blow striking the outer rim. He did not testify

that *such* a blow *"could"* have caused or *"might"* have caused the separation. Mr. Harris was asked for and expressed his opinion as to the cause of the separation of the specific wheel involved in this litigation. The question was not hypothetical in form and was improper for that reason.

We submit that admitting this testimony, over objection, was prejudicial error.

POINT 3.

THE TRIAL COURT ERRED IN ADMITTING THE HEARSAY TESTIMONY OF MR. LOWELL G. FOUTS.

There was a conflict in the evidence as to whether or not there was a track at the scene of the accident that went off the surface of the road on the east side thereof and over the edge of the shoulder. Mr. Stinnett testified there was (R. 257 to 260, 267 to 272). Mr. Milovich and Beverly Hooper testified they did not see one (R. 163, 164, 107, 108, 109, 110). Appellant testified the truck never left the road (R. 122, 127).

Lowell G. Fouts, over objection, was permitted to testify, in substance, that Mr. Stinnett told him there was a track or mark that ran off the road and that Mr. Stinnett had shown him such a mark sometime after the accident. Mr. Fouts further testified that he went to the scene of the accident in May, 1952, several months after the accident with Franklin Harris and the same mark was still evident (R. 400, 401, 402, 403).

The only purpose for offering and admitting this

testimony was for the truth of the fact asserted by Mr. Stinnett, namely, that such a mark going off the road in fact existed.

We submit the testimony was hearsay and the court erred in admitting it, and in refusing to strike it on motion of the appellant.

Point 4.

THE TRIAL COURT ERRED IN ADMITTING THE SPECULATIVE TESTIMONY OF MR. ARTHUR HARRIS.

The trial court, over objection that the testimony was speculative, permitted Mr. Arthur Harris to testify that if the left rear wheel of the truck struck a boulder of any size or type as shown in Exhibit "1" and there was some side motion to the truck that that would be enough force to cause the shearing of the rivets and the separation of the spider, Exhibit "A", and the rim, Exhibit "B", provided the boulder was partially buried so that there would be resistance to its sliding (R. 393, 394).

There was no assumption made at all as to the speed of the truck at the time of hitting such a boulder. There was no evidence in the record at all that any boulders of any size were partially buried. There was no evidence that there were any boulders either buried or otherwise in or near the track which Mr. Stinnett said went off the road.

The testimony was admitted, over objection, and the trial court refused, on motion of appellant, to strike

it from the record. Mr. Harris was permitted to speculate and give his conjectural views on a vital issue in the case, namely, what caused the accident. We submit the admission of the testimony and the refusal to grant appellant's motion to strike was prejudicial error.

Respectfully submitted,

McBROOM & HANNI and
E. R. MILLER, JR.,
Attorneys for Appellant.